

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTERS OF A SHORELINES
SUBSTANTIAL DEVELOPMENT PERMIT
AND A CONDITIONAL USE PERMIT
ISSUED BY THE CITY OF DUPONT TO
THE WEYERHAEUSER COMPANY,

NISQUALLY DELTA ASSOCIATION and
WASHINGTON ENVIRONMENTAL COUNCIL,

Appellants,

v.

THE CITY OF DUPONT and
WEYERHAEUSER COMPANY,

Respondents,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Intervenor,

and

NISQUALLY DELTA ASSOCIATION and
WASHINGTON ENVIRONMENTAL COUNCIL,

Appellants,

v.

THE CITY OF DUPONT,
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY and
WEYERHAEUSER COMPANY,

Respondents.

SHB Nos. 81-8 & 81-36

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

These consolidated matters, the requests for review of a shoreline
substantial development permit and a conditional use permit, came
before the Shorelines Hearings Board, David Akana (presiding), Gayle
Rothrock, Nat Washington, Rodney Kerslake, A. M. O'Meara, and Cleve

Pinnix at a hearing on January 13, 14, 15, 21, and 22, 1982, in Lacey and on January 26, in Tacoma. An opportunity to file a post-hearing briefs was provided to the parties.

Appellants were represented by their attorney, J. Richard Aramburu; respondent City of DuPont was represented by its attorney, James J. Mason; respondent Department of Ecology was represented by Charles W. Lean, Assistant Attorney General; respondent Weyerhaeuser Company was represented by its attorneys, Jerome L. Hillis and Glenn J. Amster. Court reporters Betty Koharski (January 13, 14), Kim Otis (January 15), Randy Hamilton (January 21), and Lois Fairfield (January 22 and 26) recorded the proceedings.

Having heard the testimony, having considered the exhibits, and the Board having issued its proposed decision; and the Board having received exceptions to its proposed decision and replies to said exceptions, and having considered the exceptions, granting them in part and denying them in part, and having considered the contentions of the parties, the Board makes these

FINDINGS OF FACT

I

This is a consolidated proceeding before the Shorelines Hearings Board of the State of Washington (Board) brought pursuant to Requests for Review dated March 17, 1981 (amended April 2, 1981), SHB No. 81-8, and September 30, 1981, SHB No. 81-36. Appellants challenge the City of DuPont's issuance to Weyerhaeuser Company of a shorelines substantial development permit (SHB No. 81-8) and a shorelines conditional use permit (SHB No. 81-36) for the construction of an export facility in DuPont, and the Department of Ecology's approval of the conditional use permit (SHB No. 81-36). Appellants allege that the permits were issued by DuPont in violation of the Shoreline Management Act, ch. 90.58 RCW, the State Environmental Policy Act (SEPA), ch. 43.21C RCW, and other laws.

II

Appellant Nisqually Delta Association (NDA) is a nonprofit corporation organized in 1970 and existing under the laws of the State of Washington whose purpose is to protect and preserve the Nisqually River Delta.

III

Appellant Washington Environmental Council (WEC) is a nonprofit corporation comprised of more than 80 member organizations interested in preserving and enhancing the quality of the state's environment.

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTERS OF A SHORELINES
SUBSTANTIAL DEVELOPMENT PERMIT
AND A CONDITIONAL USE PERMIT
ISSUED BY THE CITY OF DUPONT TO
THE WEYERHAEUSER COMPANY,

NISQUALLY DELTA ASSOCIATION and
WASHINGTON ENVIRONMENTAL COUNCIL,

Appellants,

v.

THE CITY OF DUPONT and
WEYERHAEUSER COMPANY,

Respondents,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Intervenor,

and

NISQUALLY DELTA ASSOCIATION and
WASHINGTON ENVIRONMENTAL COUNCIL,

Appellants,

v.

THE CITY OF DUPONT,
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY and
WEYERHAEUSER COMPANY,

Respondents.

SHB Nos. 81-8 & 81-36

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

These consolidated matters, the requests for review of a shoreline substantial development permit and a conditional use permit, came before the Shorelines Hearings Board, David Akana (presiding), Gayle Rothrock, Nat Washington, Rodney Kerslake, A. M. O'Meara, and Cleve

Pinnix at a hearing on January 13, 14, 15, 21, and 22, 1982, in Lacey and on January 26, in Tacoma. An opportunity to file a post-hearing briefs was provided to the parties.

Appellants were represented by their attorney, J. Richard Aramburu; respondent City of DuPont was represented by its attorney, James J. Mason; respondent Department of Ecology was represented by Charles W. Lean, Assistant Attorney General; respondent Weyerhaeuser Company was represented by its attorneys, Jerome L. Hillis and Glenn J. Amster. Court reporters Betty Koharski (January 13, 14), Kim Otis (January 15), Randy Hamilton (January 21), and Lois Fairfield (January 22 and 26) recorded the proceedings.

Having heard the testimony, having considered the exhibits, and the Board having issued its proposed decision; and the Board having received exceptions to its proposed decision and replies to said exceptions, and having considered the exceptions, granting them in part and denying them in part, and having considered the contentions of the parties, the Board makes these

FINDINGS OF FACT

I

This is a consolidated proceeding before the Shorelines Hearings Board of the State of Washington (Board) brought pursuant to Requests for Review dated March 17, 1981 (amended April 2, 1981), SHB No. 81-8, and September 30, 1981, SHB No. 81-36. Appellants challenge the City of DuPont's issuance to Weyerhaeuser Company of a shorelines substantial development permit (SHB No. 81-8) and a shorelines conditional use permit (SHB No. 81-36) for the construction of an export facility in DuPont, and the Department of Ecology's approval of the conditional use permit (SHB No. 81-36). Appellants allege that the permits were issued by DuPont in violation of the Shoreline Management Act, ch. 90.58 RCW, the State Environmental Policy Act (SEPA), ch. 43.21C RCW, and other laws.

II

Appellant Nisqually Delta Association (NDA) is a nonprofit corporation organized in 1970 and existing under the laws of the State of Washington whose purpose is to protect and preserve the Nisqually River Delta.

III

Appellant Washington Environmental Council (WEC) is a nonprofit corporation comprised of more than 80 member organizations interested in preserving and enhancing the quality of the state's environment.

IV

Respondent City of DuPont (DuPont), a city of about 560 persons, and 5 square miles, is a municipal corporation organized and existing under the laws of the State of Washington. As provided by the Shorelines Management Act of 1971 (SMA), DuPont developed a shoreline master program (DSMP) for regulating shoreline uses within its jurisdiction.

V

Respondent Department of Ecology (DOE) is an agency of the State of Washington. Among the duties and functions of DOE is the interpretation and implementation of SEPA and of the SMA including approvals of shoreline master programs. DOE approved the DSMP on June 11, 1975. WAC 173-14-3503.

VI

Respondent Weyerhaeuser Company (Weyco) is a corporation organized and existing under the laws of the State of Washington. In 1976, subsequent to the adoption and approval of the DSMP, Weyco proposed to construct an export facility in DuPont to provide a central location for receiving and shipping its western Washington forest products to offshore markets.

VII

From about 1909 to 1975, E.I. duPont DeNemours & Company, Inc., (DuPont Company) manufactured explosives on the site now owned by Weyco in DuPont. During that same period the DuPont Company shipped explosives and chemical products to and from the dock which is located adjacent to the site. Access to the dock was by a narrow gauge railway which ran through the Sequatchew Creek Canyon, an open suspended bucket system for transporting raw materials, and pipelines for transporting petroleum products from the dock to the upland industrial facilities. Approximately 1200 acres of the site were occupied in connection with the DuPont Company operations. Fort Lewis used and continues to use almost 600 acres of the site as a training area, sanitary landfill, and rifle range. The remaining DuPont Company facilities at the site after the termination of its activities include various structures, the dock and road and rail access from the vicinity of Interstate Highway 5. Burlington Northern railroad tracks run along the entire length of the Puget Sound shoreline in DuPont. Although the DuPont Company discontinued manufacturing explosives at DuPont in 1977, storage and shipment of explosives continued for some time thereafter.

VIII

The proposed export facility project includes a new dock, a marshalling area and terminal for receiving, handling, and storage of wood products, and the necessary road and rail access. (See Appendix A.) The entire facility, including road and rail access rights-of-way, will occupy approximately 250 of the 3200 acres owned by Weyco in DuPont. The proposed dock is near the location of the existing dock and Sequelitchew Creek delta, and generally parallel to the shoreline, about one-half mile from the Nisqually National Wildlife Refuge (NWR). The remaining facilities would be located on the upland portion of the Weyco property approximately one-half mile from Puget Sound. The export facility will be located generally in the northern-most portion of Weyco's property, except for road and rail access.

The sole function of the facility is for the export of forest products. Weyco does not intend to receive imported cargo at the dock. No product storage or log rafting will occur along the shoreline. Weyco, in its testimony, asserts that the use, as limited, is economically sound.

IX

The existing dock was not used by Weyco but it had been leased to the DuPont Company until late 1978. Weyco continues to maintain the structure and uses the railroad tracks irregularly. The dock would be removed and the railroad tracks partially removed should Weyco proceed with its proposal.

Existing facilities south of Sequelitchew Creek will not be used except for the roads, water wells, and some buildings. There are no present plans to develop the area.

X

Weyco's proposal for an export facility in DuPont triggered the application of SEPA. Pursuant to the SEPA Guidelines, the applicant, Weyco, submitted a completed environmental checklist to DuPont, describing the expected environmental impacts of the project. DuPont assumed lead agency responsibility for the Weyco proposal. DuPont determined that the export facility proposal would require an environmental impact statement (EIS).

XI

On August 21, 1978, DuPont published a draft EIS for the export facility. It was initially sent to various federal, state, and local agencies and organizations for their comments and suggestions on the project. Eight regional and local newspapers were asked to publish a

press release announcing the availability of the draft EIS at the DuPont City Hall and at several libraries throughout the region. In addition, copies of the draft EIS were sent to appellants.

XII

Based on the testimony and comments received, DuPont revised the draft and issued a final EIS for the export facility proposal on February 2, 1979. Agency and public comments, and the City's responses to those comments, were included as an appendix in the final EIS. Additional appendices responded to specific topics in the areas of seismic geology, air quality, water quality, flora and fauna, noise, oil spills, regional land use policies, pollution impacts, contingency plans, and availability of the Port of Tacoma.

XIII

On January 22, 1979, the DuPont City Council adopted the proposed final EIS to be issued as the City's final EIS. In March, 1979, DuPont transferred lead agency responsibility to DOE. DOE determined that the final EIS issued by DuPont met all legal requirements and was adequate for all state and local government actions relating to the proposed export facility.

"Notice of Action" pursuant to RCW 43.21C.080 was publicized by publishing on July 3, and July 10, 1979, in the Tacoma News Tribune, filing with DOE on July 2, 1979, and posting on the project site on June 27, 1979.

XIV

The final EIS has been held adequate by the Pierce County Superior Court, Nisqually Delta Ass'n v. City of DuPont, No. 281197 (judgment entered July 3, 1980), on appeal, Nisqually Delta Ass'n v. City of DuPont, No. 4935-II (Washington Court of Appeals, Notice of Appeal filed August 1, 1980). The superior court determined adequacy under SEPA in several subject matter areas of relevance to this matter.

XV

In August, 1978, Weyco applied for a substantial development permit for construction of the export facility at the "proposed" location described in the final EIS. If constructed at this location, portions of the dock would have been in Pierce County and outside the DuPont city limits. Weyco purchased a small, triangular parcel of property and the accompanying tidelands, lying immediately north and adjacent to the land Weyco had acquired from the DuPont Company, and requested that DuPont annex this property so that all of the facility would be located within its jurisdiction.

XVI

Appellants filed suit against Weyco, DuPont, and the Pierce County Boundary Review Board, challenging the annexation. The Washington Supreme Court ruled that appellants lacked standing to appeal the annexation under the statute they had elected to pursue the appeal (95 Wn.2d 563).

XVII

Weyco desired to locate the dock as far north along the shoreline as possible. The preferred location in the final EIS was this northerly location.

The preferred location, however, crossed the jurisdictional boundary between DuPont and Pierce County and, consequently, the boundary between the "urban" shoreline designation in DuPont and the "conservancy" shoreline designation in the Pierce County Shoreline Master Program. Securing a change to an urban designation in order to proceed with dock construction raised the possibility of further delays. Weyco altered its plans to the permitted location to avoid this further delay.

XVIII

Because of the uncertainty surrounding the selection of the "proposed" location, Weyco then applied for the substantial development permit which is the subject of the appeal in SHB No. 81-8 on January 5, 1981. Notice of the permit application was given by publication in the Tacoma News Tribune on January 7 and January 14, and posted on January 6, on five places on the property.

XIX

The application describes the proposed substantial development as a new 140 foot by 1320 foot precast concrete pier located at the site of the existing pier in Nisqually Reach of Puget Sound, a reinforced earth roadway in Sequelitchew Creek Canyon, and a 57 foot by 500 foot precast concrete causeway from the end of the canyon road to the new pier. A complete description of the project is referenced in the final EIS which summarizes the proposal as including "a new dock and necessary loading equipment, a marshalling area for forest products, a log debarker, a materials handling system to move products to the dock, a terminal area for receiving, handling and storage of finished products and logs, the necessary supporting road access from the interstate system, and rail access. The purposes of the proposed facility are to provide a central location for receiving forest products from company manufacturing and woods operations in Western Washington, and for rapid loading of forest products into large

ocean-going vessels." The final EIS identifies the intended use of the proposed development. The final EIS also describes more developments than are found in the shoreline permit application.

XX

The new pier would be a relatively low profile structure situated roughly parallel to the shoreline. The dock would be capable of serving two 660 foot long ships with drafts up to 50 feet. A typical present-day vessel would stay about four days at a time based on a two-shift per day operation.

No dredging or filling is contemplated to construct the dock and causeway, and is not a permitted construction or maintenance activity. Cranes will not be located on the dock although the dock is designed to accommodate them in the future. A small office building would be located on the dock. Parking would be provided on the upland bluff.

XXI

The proposed dock will have mooring dolphins within 75 feet of the dock on either end. The dolphin at the northern end of the dock lies within an urban designation of the DSMP and is about 20 feet from the boundary of a conservancy designation.

The piles of the proposed dock will be installed by barge-mounted equipment. The dock could be constructed in about 8 months. The road and dock could be completed within one year.

Lighting at the dock will be provided from 8 lights located 85 feet above the dock. Unless properly adjusted, these lights can be a source of light or glare on or across the water surface. Lighting on vessels will be provided by the vessel itself. No lights will be provided on the roadway up Sequelitchew Creek Canyon.

Runoff from the dock will be skimmed for oil and collected in a 158,000 gallon tank located under the dock. As with other permit conditions imposed by DuPont, Weyco has not yet designed the facilities required by such conditions.

The access causeway from the shore just north of the mouth of Sequelitchew Creek would connect to the middle of the dock.

The dock and causeway will be constructed in Nisqually Reach, within a shoreline of statewide significance.

XXII

The roadway between the upland staging area and the dock would be located on the north side of the Sequelitchew Creek Canyon. The road would be a 40 to 50 feet wide paved surface with a maximum grade of 5 percent. The road would be a reinforced earth structure using a retaining wall. The existing land contours, aside from the road, would be unchanged.

XXIII

Under Weyco's market projections, unless it anticipates change, the company will not be competitive. One factor in the competitive cost picture is transportation costs. The development of a high-volume (2 million tons per year), low-cost delivery system would reduce transportation costs. Weyco thus foresees a need for an efficient, new generation loading facility to reduce costs, in the form of a "one stop shop" export facility. At such a facility, it is envisioned that a vessel could take a full load of a mix of products which cannot now be done. The large DuPont site offers Weyco an opportunity to create a centrally located facility close to road and rail services and uncluttered by restraints associated with existing industrialized areas. The need for such a facility and its economic viability, as represented by Weyco, is justified based on the anticipated growth of water-accessed markets, employment growth, and a greater significance of those factors in the year 1990 and beyond.

XXIV

The DuPont site encompasses a much larger area than is required for the export facility. Industrial facilities could eventually be developed on the site. In the event that such development is desirable, Weyco's planning consultant sought to maintain maximum flexibility for future development of the site.

At this time, Weyco has neither plans for nor decisions regarding any facility on the site other than the proposed export facility. When a decision is made to build a new facility, such as a lumber mill, Weyco will analyze pertinent business factors and other sites before deciding where to locate the new operation. If the DuPont site is selected to construct facilities other than those covered by the final EIS for this development, they would require new SEPA compliance.

XXV

About 73% of the state's harbor areas are not being used. Vacant areas can be found adjacent to existing facilities at Everett, Bremerton, Kalama, Steilacoom, Grays Harbor, Longview, Tacoma, and Vancouver. These sites do not meet Weyco's criteria for an export facility.

XXVI

Existing port facilities including Weyco's own existing docks around Puget Sound are not being used efficiently. Although idle dock space can be found, the available port facilities do not meet Weyco's projected need to rapidly load its mix of products. The proposed facility would enable Weyco to eliminate four to six stops and reduce travel time on each ship's schedule, and replace it with one stop at

DuPont. Weyco anticipates that the cost savings and improved access to foreign markets from the use of the new one-stop facility are economically justifiable. Weyco expects to continue using its other docks after the DuPont facility is completed.

XXVII

DOE review of alternative sites for the proposal was conducted in its review of the EIS and not under the SMA.

XXVIII

Although the Sequelitchew Creek delta is not within the geographic boundaries of the Nisqually National Wildlife Refuge (NWR), it is located within the "Nisqually Delta" by definition in the SMA. Biologically speaking, it has been described as the "little finger" of the Nisqually Delta. The loss of the "little finger" would reduce options available to the main delta.

XXIX

A survey of the intertidal micro-fauna and flora at the Sequelitchew Creek delta disclosed the most diverse and productive area of any area sampled in a May 1978 survey of the proposed dock site and Nisqually Delta. (Exhibit A-31.) Eelgrass beds can be found in the vicinity of the Sequelitchew Creek delta.

The location of the dock in deeper water beyond the outfall of the delta still raises appellants' concerns on the impacts to the Sequelitchew Creek delta intertidal areas and to the affected wildlife and fishlife, including salmonid species. The area is regularly fished. Appellants have valid concerns for preserving the current identity of the Sequelitchew Creek delta. The final EIS does not answer these concerns directly at the permitted dock location. The permitted dock (excluding causeway) is not within the intertidal area surveyed, however.

The dock could preclude visits of some bird species depending on their tolerance to human activity. Among the vertebrates that might be discouraged by high activity at the site, would be the re-establishing population of harbor seals in the Nisqually Delta.

XXX

The access road to the ramp will be located near but sufficiently removed from the mouth of Sequelitchew Creek to avoid interference with the outflow. About 3000 feet of roadway would be located within the shorelines of Sequelitchew Creek. Trucks would be the major vehicles using the road.

Two oil tanks and a power/pump house located within the drainage basin of Sequelitchew Creek will not be used or removed by Weyco and appear to be potential items of curiosity in the future.

XXXI

As the lead agency under the SEPA Guidelines, DOE reviewed the change in the proposed dock location from that set forth in the final EIS. No substantially different impacts were identified from that in the final EIS, including environmental impacts in the Sequelitchew Creek delta.

There were no significant differences shown in impacts between the "proposed" and "alternate" dock locations as described in the final EIS, and the dock location as permitted near the Sequelitchew Creek delta. However, the permitted location does have several disadvantages when compared to the preferred location described in the final EIS. First, it extends the dock some 1000 feet closer, about one third of the distance, to the Nisqually National Wildlife Refuge. Second, there will be increased disturbance of sediments during construction, due to thickening of the alluvial deposits at the permitted location. Third, there could be a more profound effect on the delta of Sequelitchew Creek and the important wildlife use of this area but this is difficult to quantify.

XXXII

The Nisqually Delta is one the most biologically productive estuaries in Puget Sound, and is the most productive estuary in southern Puget Sound. Unlike many of the other deltas along Puget Sound, the Nisqually Delta has been little altered since the turn of the century. It is the foremost and best protected in terms of its "integrity" as a delta.

XXXIII

The Nisqually Delta is viewed as a complex, undeveloped place, with flood plains and three unique watercourses: the Red Salmon stream fed by runoff, the Nisqually River fed by glacial melt, and McAllister Creek fed by an artesian spring.

Compared with other deltas, the Nisqually delta is not as heavily developed or used. Although there is some diking, railroad tracks, the I-5 highway, and compatible dairy farming, it remains a high-quality delta area.

XXXIV

The species of wildlife in the Nisqually Delta are not particularly unique, although some are thought to be more important

than others, e.g. salmonid species. What is unique in the delta is the number and kinds of species it supports. As the last remaining substantial delta in south Puget Sound, the site hosts resident, migrating and wintering birds of many types, such as snowy owls, falcons, hawks, geese and many other shorebirds, waterfowl and perching birds. Bald eagles have been seen in the Nisqually Delta flying toward the DuPont dock. The large diversity of wildlife brings stability to the dynamic community.

XXXV

The view of the waterfowl and shorebirds from the end of the dike in the NWR has been described as "primeval." The Refuge appears to support wildlife without evidence of human impact. As the seasons come and go, different wildlife activities emerge.

The Nisqually Delta has been used as a natural laboratory to teach and demonstrate the behavior and survival needs of wildlife.

XXXVI

The NWR was established in 1974 with the objective of maintaining a diversity of habitat and species, providing a wintering area for ducks and geese, and providing for public recreation. Because public recreation does not coincide with the use of the entire area, access to some areas is restricted. Access is also restricted during hunting season. There is a continuing program to complete the acquisition of land within the boundaries of the refuge.

XXXVII

There is concern that noise, lights and activity from the DuPont site would disturb birds in the Delta. There are other concerns about water pollution affecting the food chain and the loss of aesthetic values as a result of the proposed development.

There are real environmental risks associated with the construction and operation of an export facility such as from an oil spill. The risk is discussed in the final EIS, but has not been shown to be unreasonable.¹ There are also concerns for maintaining water

1. Based on the assumptions for Weyco vessels stated in the final EIS for use as an export facility, the risk of vessel casualties would increase one casualty every 12 years, which may or may not involve oil spills. The risk of an oil spill of about 300 gallons would increase to one spill every 118 years. The risk of a major oil spill is extremely small. Final EIS pp 2-91 to 92.

quality in the south Puget Sound area. There is no evidence bark would be a source of water pollution because it is Weyco's intent to debark logs elsewhere.

Aesthetics presently associated with the Nisqually Delta would be compromised by the activity at the proposed dock. Aesthetic losses and disturbing activity in the waters of Nisqually Reach would tend to move the delta away from its relatively natural condition.

XXXVIII

At this point, the U. S. Fish and Wildlife Service (F&WS) could be satisfied that the impacts from the proposed export facility would be mitigated if the aesthetic impact on the NWR is minimized, water quality is not degraded, and future development is controlled. Weyco and F&WS have reached a tentative understanding as to what specific measures would achieve an acceptable level of mitigation.²

XXXIX

Public access at or near the subject shoreline is restricted at the present time. Weyco anticipates that additional public access at the site will be provided after a comprehensive plan is developed by Dupont.

During construction, public access on the site must be restricted for safety reasons. After construction, public access through the Burlington Northern railroad track underpass is possible but is not required by any permit. No public access is provided along Sequelitchew Creek.

Pedestrian access will be possible under the dock access ramp except during periods of high tides.

Public access to and on the dock is not compatible with the activities intended on it.

2. Mitigation measures include providing scenic easements along certain bluff areas of the shorelines in Puget Sound, certain scenic and wildlife management easements on and near Sequelitchew Creek, covenants limiting development on Hoffman Hill overlooking Puget Sound, at Old Fort Lake and Oak Savannah, limiting activity in Edmond Marsh and Weyco tidelands south of Sequelitchew Creek to those consistent with a "conservancy" rather than "urban" designation, and establishing a written plan for spill prevention containment and control during construction and operation. See Ex. RD S-62. We are advised that these measures affect about 273 acres of the DuPont site.

XL

The DuPont site has important archeological and historical resources in terms of Indian culture and a trade center for early British and American settlers. (See Final EIS pp 2-127 to 2-136.) Although there are many identified and potential sites, four are more notable at this time: the 1843 Fort Nisqually, the 1833 Fort Nisqually, the Methodist Episcopal Mission and the Wilkes Observatory. Three of the four sites are situated near, but upland of, 200 feet from the ordinary high water mark. (See Exhibit RD S-51.)

XLI

Unrestricted public access to historical sites on the upland could be difficult and sometimes unsafe. The comprehensive plan is to address this topic. Weyco has anticipated for and does not object to providing public access and has located the facility north of Sequelitchew Creek with this partly in mind. There are no plans for controlled public access to the historic sites at this time.

XLII

Public use of the waters in Sequelitchew Creek delta and in Nisqually Reach near the proposed development would be eliminated or discouraged at or near the site because of the proposed activity, over and above that experienced with the existing dock. Also, the regular use of the area around the existing dock location as a fishing area may be lost.

XLIII

The shoreline of Sequelitchew Creek, beyond the shoreline associated with Nisqually Reach, is not a shoreline of statewide significance and is designated "urban" along its entire length in the DuPont Shoreline Master Program.

XLIV

The January 5 application requests approval for a dock that combines certain aspects of the "proposed" and "alternative" dock locations depicted in the EIS. The permitted dock location overlaps the two previous design alternatives on the site of the existing DuPont Company wharf. It is located entirely within the original DuPont city limits on a shoreline designated "urban" under the DSMP.

XLV

On January 9, 1981, DuPont requested that the lead agency, DOE, review the final EIS to determine whether its earlier adequacy determination sufficiently addressed the potential environmental consequences of the dock at the described alternate site location. DOE conducted an independent analysis of these issues and on February 11, 1981, informed DuPont that the final EIS was adequate and contained information sufficient to allow the City to make a permit decision.

XLVI

No formal notice of any change in the proposed dock location as shown in the January 5, 1981 application was given by DuPont or DOE to any of the more than 20 agencies receiving the final EIS.

XLVII

On January 21, 1981, upon due notice, the DuPont City Council held a public hearing to take oral testimony on the substantial development permit application. Both Weyco and appellants appeared and submitted oral and written testimony at this hearing, along with several members of the public.

XLVIII

On February 18, 1981, the DuPont City Council held a public meeting to consider the permit application. The DuPont City Council voted unanimously to approve Resolution No. 73 relating to Weyco's permit application and directed that a substantial development permit be issued to Weyco, subject to specific conditions on construction and operation of the facility. (See Appendix B.)

XLIX

On March 19, 1981, appellants filed a Request for Review, challenging the issuance by DuPont of the substantial development permit. Appellants filed an Amended Request for Review on April 6, 1981, SHB No. 81-8. DOE intervened in the appeal on April 8, 1981.

L

Over the course of several weeks, the parties met to discuss the potential for resolution of the issues. As a result of these discussions, on May 29, 1981, DOE, DuPont, and Weyco entered into an agreement fully resolving all issues raised by DOE in its pleadings. A stipulation incorporating the agreement was filed with the Board on July 6, 1981.

LI

The potential impacts of future upland developments are DOE's primary concern with this project. Because long range development for the site is now unknown, a comprehensive development program is needed to identify appropriate uses. DuPont will determine the upland uses with DOE's active participation.

LII

On July 7, 1981, Weyco requested that DuPont reprocess its shorelines permit application dated January 5, 1981, under the conditional use permit procedures.

LIII

Notice of Weyco's application for a conditional use permit was given by publication in the Tacoma News Tribune on July 8 and July 15, 1981, and by posting on the property on July 14, 1981.

LIV

On August 19, 1981, upon due notice, the DuPont City Council held a public meeting to consider Weyco's application for a shorelines conditional use permit. The City Council voted unanimously to approve resolution No. 76 which contains findings relative to Weyco's permit application and directs that a shorelines conditional use permit be issued to Weyco, under the same terms and conditions as the previously issued substantial development permit. (See Appendix C.)

LV

On August 20, 1981, DuPont submitted the shorelines conditional use permit to DOE for approval. By letter dated August 31, 1981, and mailed September 2, 1981, DOE approved the shorelines conditional use permit pursuant to WAC 173-14-140 for a "forest products transshipment facility consisting primarily of a dock, access roads, marshalling yard and road and rail access from Interstate Highway No. 5."

LVI

On October 1, 1981, appellants filed a Request for Review, challenging the issuance by DuPont and the approval by DOE of the shorelines conditional use permit.

LVII

Prehearing motions on several issues raised in the Requests for Review were heard by the Board. Those issues for which summary judgment was granted are not further discussed in this decision. (See Appendix D.)

LVIII

The DSMP provides policies and regulations for ports and water-related industries. DSMP, pp 32-34. (See Appendix E.) Such activities are permitted in the urban environment designation under the general regulatory standards and conditional use requirements. DSMP, p 34.

An "urban" designation allows industrial, commercial, and dense residential uses, among others. DOE's approval of DuPont's SMP in 1975, did not limit the type of uses in the urban designation. Concern was then expressed by DOE for impacts on the Nisqually estuary from any intense industrial and commercial development, however. The applicability of the conditional use permit requirements in the DSMP appear to allow DOE to address its concerns through the approval or disapproval of such permit for a specific proposed development near the Nisqually estuary.

The conditional use provision is intended to provide more control and flexibility for implementing the regulations of the DSMP. By controlling undesirable effects, additional uses may be included in a particular environment. DSMP, p 93. Conditional use permit requirements are:

1. The use will cause no adverse effects on the environment or other uses;
2. The use will in no way interfere with public use of the shorelines;
3. Design of the site will be compatible with the surroundings;
4. The proposed use will not be contrary to the general intent of the Master Program.

(See Appendix E.)

LIX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board enters these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and subject matter of this proceeding.

II

In an appeal of any permit issuance, the party attacking the validity of such permit has the burden of proof. RCW 90.58.140(7).

III

The instant permits are tested for consistency with the DSMP and the provisions of the SMA. RCW 90.58.140(2)(b).

The proposed action is also reviewed for compliance with the requirements of the SEPA. RCW 43.21C.060.

IV

DuPont and DOE have affirmatively demonstrated prima facie compliance with the requirements of SEPA.

The adequacy of the final EIS has been litigated in Pierce County Superior Court, and the issues addressed therein are conclusive as between those parties. Additionally, any challenge to the adequacy of the final EIS for which a "Notice of Action" has been publicized was required to have been commenced within thirty days from the date of last newspaper publication, or be barred. RCW 43.21C.080(2)(a). A challenge to the action as proposed in the final EIS would not now be timely commenced.

V

The change in the dock location to a position straddling the "proposed" and "alternate" dock locations in the final EIS is contended to require a new threshold determination for the instant proposed actions.

The "proposed actions" or "proposals" [WAC 197-10-040(2, 29)] are essentially the same for the proposed export facility. What has changed is the location of the proposed dock, which is not so substantially different from that described in the final EIS as to require a new threshold determination or a supplemental EIS. WAC 197-10-390; 495; 660; 690. There are no additional notice requirements for the final permitted dock location in SEPA or its Guidelines, and none are implied. Accordingly, neither DuPont nor DOE were required to consult, coordinate or notify adjoining jurisdictions because of such a change in the dock location.

VI

The final EIS was not shown to be inadequate because of a change in the dock location to a place between the "proposed" and "alternate" locations considered in that document.

The proposal in the final EIS was not shown to have been substantially changed, and a collateral challenge to the adequacy of the final EIS is barred by RCW 43.21C.080(2)(a).

VII

The application for a shoreline substantial development permit substantially complied with the provisions of the DSMP and chapter 173-14 WAC.

The physical facilities were adequately described and with sufficient specificity for this Board to evaluate the environmental concerns raised. There is an issue raised about the intended use of the facilities. To foreclose further concerns on this issue, the use should be specified on the permit which limits the activity to the export of forest products as provided in the final EIS and testimony. Similarly, the question of permit revisions should be clarified by reference to the regulations.

The limitations are consistent with the scope of the proposed development as described by Weyco in its permit applications, public notices, and final EIS. The agreement between DOE, DuPont and Weyco (Finding of Fact L) cannot now expand the scope of the permits issued beyond the uses identified. In the future, if Weyco desires to expand the allowed uses, it may then seek another permit and comply with SEPA. Clearly, Weyco cannot now be granted more than it applied for.

VIII

The SMA requires coordinated planning to prevent the inherent harm from uncoordinated and piecemeal development of the shorelines. The policy and implementation of the act to achieve coordinated development is set forth in RCW 90.58.020:

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and

wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

.

In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

IX

Development on shorelines is not prohibited. What is prohibited is uncoordinated, piecemeal development. The policy insures that developments which promote and enhance the public interest may be allowed to reduce public rights in the navigable waters to a limited extent.

The policy also contemplates protecting against adverse effects to, among other things, the wildlife and the waters and their aquatic life. The standard is not absolute, however. The physical and

aesthetic qualities of natural shorelines are to be preserved "to the greatest extent feasible consistent with the overall best interest of the state."

The resolution between the twin goals of preservation and development is a system of preferred and priority uses on shorelines of the state, and a policy statement as to what is in the overall best public interest.

Preferred uses are either inherently compatible with the natural environment or those which are unique to or dependent upon a shoreline location.

Of those preferred uses, the SMA contemplates limited, planned "alteration of the natural condition of the shorelines of the state" for certain enumerated "priority" uses, such as ports, water dependent industrial and commercial developments, and other developments that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

The instant proposed substantial development, a water dependent facility, is a preferred use. It is also a "priority" use specifically contemplated by the SMA. Accordingly, such development is authorized under the policy of the SMA on our natural shorelines, where coordinated planning for reasonable, appropriate shoreline uses has occurred.

Such planning is evident through the adopted and approved DuPont Shoreline Master Program. For the foregoing portion of the policy of the SMA, consistency with the DSMP becomes the foremost issue.

X

The Shoreline Management Act describes two categories of shorelines of the state: "shorelines" and "shorelines of state-wide significance." RCW 90.58.030(c). The interest of all of the people is paramount in the management of shorelines of state-wide significance. In developing master programs for such shorelines, uses are preferred in an order which:

- (1) Recognize and protect the state-wide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

RCW 90.58.020. As to those portions of a master program relating to shorelines of state-wide significance, DOE has full authority, following submission by local government, to develop an alternative master program which provides the optimum implementation of the policy of the SMA to satisfy state-wide interest. In this matter, DuPont has developed a master program providing for uses it believes are appropriate on its shoreline of state-wide significance. The DuPont master program was approved by DOE. There is a presumption that the regulations developed have given the proper preference to uses as provided in RCW 90.58.020.

Further, it is entirely consistent with the foregoing, that DOE should reserve permit approval authority for ports and water-related industry activities on the Nisqually Delta shorelines to satisfy state-wide interests.³

XI

Appellants do not challenge the master program provisions for the shorelines in question but do challenge their application to the specific development.

The evidence shows some adverse effects and some interference with the public use of the shorelines in the vicinity of Sequelitchew Creek delta. This is said to violate the SMP conditional use criteria [Finding of Fact LVIII]. The city's finding that the proposed use will cause "no unreasonably adverse effects"⁴ is alleged to be an erroneous interpretation of the criteria.

The SMP language is unambiguous, as appellants' assert. However, when the SMP is read as a whole, including the goals, policies, and use regulations, such language should not be construed to, in effect, prohibit or make illusory the proposed use. The city's construction of its SMP and DOE's approval of it are entitled to some deference. Finally, the city's construction of its SMP does not appear to be inconsistent with the underlying provisions of the SMA.⁵

3. Weyco has applied for and received a conditional use permit from DuPont, which makes the issue of the necessity of such a permit moot. We do not comment further upon it.

4. See Resolution No. 76, Appendix C.

5. See Order on Motions, December 11, 1981, para. 3(2), Appendix D.

Applying a "reasonableness" standard to interpret the DSMP conditional use requirements, we find adverse effects on Sequelitchew Creek delta and on the Nisqually Delta, but not unreasonably so. We find some interference with the public use of the shorelines at the vicinity of the proposed dock. Except for aesthetics, the design of the site has not been shown to be incompatible with the surroundings. The proposed use has not been shown to be contrary to the general intent of the master program. The same conclusion would apply using WAC 173-14-140, which is the DOE criteria.

XII

The substantial development, as proposed, is inconsistent with the DSMP and the provisions of the SMA with respect to interference with the public use of the shorelines at or near the proposed dock, the dock access causeway, and the access road. Weyco's private interests, while perhaps beneficial to the state economically, do not promote and enhance the public interest, generally, on shorelines of state-wide significance. The reduction in public rights of navigation and corollary rights thereto, can be mitigated by increasing recreational opportunities for the public on the available shoreline which is not incompatible with Weyco's operations and safety considerations. Specific provision can be made for enhancing public access along shorelines to locations of historic significance and to public viewing areas consistent with F&WS management concerns. Permit conditions addressing these areas would also further ameliorate the aesthetic impact associated with the development. The mitigation of the loss to the aesthetic values associated with the shorelines and to the public's use of the waters is required of uses permitted in the shorelines:

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

RCW 90.58.020. If specific permit conditions were added, as opposed to a general reference in a comprehensive plan yet to be developed, the proposed substantial development would be consistent with the criteria of the DSMP, the provisions of the SMA, and the substance of SEPA. The inclusion of the substance of the following conditions would make the project consistent with all these criteria:

1. The Weyerhaeuser Company shall provide no less public access than that described in the permit conditions (Exhibit C) in terms of amount and type of public access; and

2. The Weyerhaeuser Company shall, in addition, provide for appropriate public access, consistent with standards for archaeological and historic preservation, to areas of historic significance on the site, including the 1833 Fort Nisqually, the 1843 Fort Nisqually, the Methodist Episcopal Mission and the Wilkes Observatory, unless such public access is inconsistent with the comprehensive plan to be developed or other permit conditions.

3. The "Weyerhaeuser Export Facility Proposal Permit Conditions" (Resolutions 73 and 76, Exhibit A), paragraph A.1.(f), is modified to add "across or" between the words "glare" and "on".

XIII

The proposed substantial development has not otherwise been shown to be inconsistent with the DSMP or the SMA.

XIV

The remaining issues raised by appellants have been addressed by the Board's Order on Motions, dated December 11, 1981, have been abandoned, or are not meritorious.

XV

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

ORDER

The shorelines substantial development and conditional use permits issued by the City of DuPont to the Weyerhaeuser Company are remanded to the City of DuPont for the addition of the following conditions and modifications:

1. The substantial developments shall be used only for the purpose of shipping outgoing raw and manufactured forest products (not to include any type of chemicals, distillates, extractives or bark-covered logs) and shall not be used to receive any cargo or for product storage or log rafting.

2. The Weyerhaeuser Company shall undertake, as a minimum, those measures identified in the tentative understanding between Weyerhaeuser and the U.S. Fish and Wildlife Service (Exhibit RD S-62) which minimize the adverse impacts on wildlife, water, air quality, public access, aesthetics and other environmental values within the shoreline areas.

3. Any modification of the substantial development shall comply with WAC 173-14-064.

4. The Weyerhaeuser Company shall provide no less public access than that described in the permit conditions (Exhibit C) in terms of amount and type of public access.

5. The Weyerhaeuser Company shall, in addition, provide for appropriate public access, consistent with standards for archaeological and historic preservation, to areas of historic significance on the site, including the 1833 Fort Nisqually, the 1843 Fort Nisqually, the Methodist Episcopal Mission and the Wilkes Observatory, unless such public access is inconsistent with the comprehensive plan to be developed or other permit conditions.

6. The "Weyerhaeuser Export Facility Proposal Permit Conditions" (Resolutions 73 and 76, Exhibit A), paragraph A.1.(f), is modified to add "across or" between the words "glare" and "on".

As conditioned, the permits are affirmed.

Done this 13th day of May, 1982.

SHORELINES HEARINGS BOARD

David Akana

DAVID AKANA, Lawyer Member

Nat W. Washington

NAT W. WASHINGTON, Chairman

Gayle Rothrock

GAYLE ROTHROCK, Vice Chairman

A. M. O'Meara

A. M. O'MEARA, Member

Rodney M. Kerslake

RODNEY M. KERSLAKE, Member

Cleve Pinnix

CLEVE PINNIX, Member

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTERS OF A SHORELINES
SUBSTANTIAL DEVELOPMENT PERMIT
AND A CONDITIONAL USE PERMIT
ISSUED BY THE CITY OF DUPONT TO
THE WEYERHAEUSER COMPANY,

NISQUALLY DELTA ASSOCIATION and
WASHINGTON ENVIRONMENTAL COUNCIL,

Appellants,

v.

THE CITY OF DUPONT and
WEYERHAEUSER COMPANY,

Respondents,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Intervenor,

and

NISQUALLY DELTA ASSOCIATION and
WASHINGTON ENVIRONMENTAL COUNCIL,

Appellants,

v.

THE CITY OF DUPONT,
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY and
WEYERHAEUSER COMPANY,

Respondents.

SHB Nos. 81-8 & 81-36

ORDER ON MOTIONS

Prehearing motions brought by appellants and respondents came

before the Shorelines Hearings Board, David Akana (presiding), Gayle

Rothrock, Nat Washington, Rodney Kerlsake and A. M. O'Meara, at a

hearing on November 30, 1981, in Lacey.

1 Appellants were represented by their attorney, J. Richard
2 Aramburu; respondent Weyerhaeuser was represented by its attorneys,
3 Glenn J. Amster and Jerome L. Hillis; respondent DuPont was
4 represented by its attorney, James J. Mason; respondent Department of
5 Ecology was represented by Charles W. Lean, Assistant Attorney General.

6 1. At the outset of the hearing, appellants objected to the
7 absence of the Commissioner of Public Lands, or his designee. The
8 presiding officer ruled that the physical presence of all members was
9 not required at a motion hearing: The Administrative Procedure Act
10 (chapter 34.04 RCW) would allow the motions to be heard by a hearing
11 examiner presiding alone; members need only consider the record in
12 order to rule on dispositive motions.

13 2. Appellants' motion to compel answers to interrogatories and
14 production of documents was heard. A preliminary ruling was made by
15 the presiding officer, after which Weyerhaeuser and appellants agreed
16 to devise a mutually satisfactory discovery arrangement. Appellants'
17 request for continuance of the motion hearing was to be considered
18 when germane to the specific motion argued.

19 3. Having considered the motions, the supporting and opposing
20 affidavits and briefs, and the files and records herein the Board
21 makes the following conclusion with respect to the indicated sections
22 of appellants' request for review in SHB No. 81-36 in the order of
23 their presentation:

24 a. Section 3.5. Appellants moved for summary judgment on
25 the ground that admitted adverse environmental impacts, together

1 with the city's finding that the proposed use will cause "no
2 unreasonably adverse effects", fails to meet the city's shoreline
3 master program (SMP) conditional use criteria that the proposed
4 use will cause "no adverse effect" and "in no way interfere with
5 the public use of the shorelines." The SMP language is
6 unambiguous, as appellants assert. However, when the SMP is read
7 as a whole, including the goals, policies, and use regulations, we
8 do not view such language to, in effect, prohibit or make illusory
9 the proposed use. See Silver Shores Mobile Park, Inc., v.
10 Everett, 87 Wn.2d 618 (1976). The city's construction of its SMP
11 is entitled to deference. Keller v. Bellingham, 92 Wn.2d 726
12 (1979). Finally, the city's construction of its SMP does not
13 appear to be inconsistent with the underlying provisions of the
14 SMA. Accordingly, appellants' motion should be, and is, denied.

15 b. Section 3.14. Motions for summary judgment on the issue
16 relating to public notice were filed by appellants and
17 Weyerhaeuser. The public notice given describes the development
18 and use: "Said facilities are to be used for the marshalling,
19 staging and waterborn shipment of forest products. For a complete
20 project description, see the Final Environmental Impact
21 Statement...." The permit application resubmitted for processing
22 under the conditional use permit procedures describes the proposed
23 use: "New 160' x 1320' precast concrete pier at site of existing
24 wharf, a reinforced earth roadway in Sequelitchew Creek Canyon,
25 and a precast concrete causeway from the end of the canyon road to

1 the ocean shipping new pier. For complete description of the
2 project, please refer to EIS...." The FEIS describes the project
3 at page 1:

4 Weyerhaeuser Company proposes to construct and
5 operate an export facility at DuPont. The proposed
6 project includes a new dock and necessary loading
7 equipment, a marshalling area for finished products
8 and logs, a materials handling system to move
9 products to the dock, a terminal area for receiving,
10 handling and storage of finished products and logs, a
11 debarker, the necessary supporting road access from
the interstate system, and rail access. The purposes
of the proposed facility are to provide a central
location for receiving forest products from company
operations in Western Washington and to allow rapid
loading of large volumes of forest products into
specifically designed ocean going vessels. Only a
portion of the forest products from the company's
northwest operations would be routed through DuPont.

12 Chapter 1 of the FEIS entitled "Description of the Proposed
13 Project" similarly describes the project. The conditional use
14 permit issued describes the development as "dock construction" and
15 "road construction" on certain described property within the
16 shoreline. The DOE approved the permit for a "forest products
17 transshipment facility" as described in the January 5, 1981 site
18 plan and as modified by DuPont Resolution No. 76.

19 We have earlier described the "scope" of a permit as the
20 development described on the face of the permit, in documents
21 referenced in the permit or application, or in supporting
22 documents such as site plans. Goodman v Spokane, SHB No. 214;
23 Department of Ecology v. Island County, SHB No. 216. The instant
24 permit application, with its supporting documents (site plans and
25

FEIS), and the permit describes the scope of the proposed development. The public notice given adequately describes the proposed development and use. WAC 173-14-070; SMP p. 91. Moreover, if any ambiguity or uncertainty remained after DuPont's action, the approval by DOE was both limiting and specific. Weyerhaeuser can do no more than what DOE has approved.

With respect to appellants' contention that the project description is inadequate, one need only refer to the site plans. The FEIS shows a proposed and alternate dock location; the site plans show the final dock location. The description is not misleading. Moreover, the permit and its supporting documents give a legal description within which the elements of the development are to be located.

There is no genuine issue of material fact and Weyerhaeuser is entitled to a judgment on the issue raised in section 3.14 as a matter of law. Appellants' motion is denied.

c. Section 3.1. Motions for summary judgment relating to the sufficiency of the permit application were filed by appellants and Weyerhaeuser. The application for a conditional use permit was signed only by Weyerhaeuser. The owner of the land on which the dock would be located is the state. The State, through the Department of Natural Resources (DNR), has not approved or authorized Weyerhaeuser to file for any permit on the subject property.

1 The SMA does not require an interest in property before a
2 conditional use permit can be issued. Neither do the rules of DOE
3 (ch. 173-14 WAC) or the City's SMP specifically impose such
4 requirements (although both inquire about the "relationship" of
5 the applicant to the property). None will be assumed. Casey v.
6 Tacoma, SHB No. 79-19. The Board's concern is with the proposed
7 development and not the property interest involved. Goodman v.
8 Spokane, SHB No. 214.

9 There is no genuine issue of material fact and Weyerhaeuser
10 is entitled to a judgment on the issue raised in section 3.1 as a
11 matter of law. Appellants' motion is denied.

12 d. Sections 3.9 and 3.10. A motion for summary
13 judgment on the grounds of noncompliance with or violation of
14 Article XV of the Washington State Constitution was filed by
15 appellants. Respondents DOE and Weyerhaeuser also moved for
16 summary judgment in their favor.

17 Section 3.9. The state constitution directs the Harbor
18 Line Commission (HLC) "to locate and establish harbor lines in the
19 navigable waters of all harbors, estuaries, bays and inlets of
20 this state, wherever such navigable waters lie within or in front
21 of the corporate limits of any city, or within one mile thereof on
22 either side." Article XV. The instant site is located within an
23 area subject to the foregoing provision. No harbor lines have
24 been drawn by the HLC at or near the instant site.

25 The SMP provides the following in its general regulations for
26 "Ports and Water Related Industries":

6. Piers/docks will be permitted to the outer harbor line or combined U.S. pierhead/bulkhead line for water dependent on water-related uses.

7. Piers/docks extending to the outer harbor or combined U.S. pierhead/bulkhead line will be permitted for multi-use facilities if the majority use is water dependent and public access is provided (when public safety can be assured).

.

9. The maximum intrusion into the water shall be no more than that required for the draft of the largest vessel expected to moor at the facilities and in no case shall intrusion extend beyond the outer harbor line.

Appellants contend that the SMA and SMP require the establishment of harbor lines as a pre-condition to the approval of any type of shoreline permit for port facilities. In particular, appellants point out that there is no way to judge whether a dock meets the SMP criteria where no harbor lines have been drawn.

The state harbor line system is a separate and distinct harbor area management system; it is constitutionally based. The SMA, on the other hand, is a comprehensive legislative response to the 1969 expression of the common-law public benefit doctrine. Portage Bay v. Shorelines Hearings Board, 92 Wn.2d 1, 4 (1979). Each system has a separate vitality and purpose. Our viewpoint is from the SMA.

The city, using its authority under the SMA, has rationally linked the two systems together in its SMP with respect to piers

and docks. However, since no harbor lines have been drawn, the SMP standards have proved illusory as far as the instant matter is concerned. If the SMP standards must be applied by their precise terms, no permit could be issued for the dock. See Skagit County v. Department of Ecology, 93 Wn.2d 742 (1980). However, a distinguishing feature between that case and the instant one is that the HLC is not authorized to adopt rules or to issue or approve permits under the SMA. That function is assigned to DuPont and/or DOE. DuPont and DOE have exercised their respective authority in adopting or approving the SMP and in issuing or approving a permit. Even though the SMP has not independently established the maximum extension of a dock/pier into the waters, a permit can be issued under the SMA. RCW 90.58.140(2).¹

With respect to the issue raised by section 3.9, there is no genuine issue of material fact. Weyerhaeuser and DOE are entitled to judgment on this issue as a matter of law. Appellants' motion is denied.

Section 3.10. Appellants contend that the approval of the permit by DuPont, DOE, or this Board would violate Article XV of the state constitution because it constitutes a giving, selling, or leasing of rights in the water beyond harbor lines.

1. The maximum extension of the dock into the waters, if disputed, is an issue subject to fact finding as though not addressed in the SMP.

1 The Board's function and purpose are created by the SMA. Our
2 review is limited by the authority granted, which does not include
3 the constitutional issue raised. Such issue is reserved to the
4 courts.

5 Accordingly, the issues raised by section 3.10 is dismissed
6 for lack of subject matter jurisdiction.

7 e. Weyerhaeuser's motion to dismiss on the grounds that the
8 appeal was not timely filed was withdrawn.

9 f. Section 3.2. Weyerhaeuser and DOE moved for summary
10 judgment on appellants' appearance of fairness and due process
11 issues. Discovery is pending on these issues and we cannot say
12 that there is no genuine issue of material fact in dispute.
13 Accordingly, the motions are denied at this time.

14 g. Section 3.4. Weyerhaeuser moves for summary judgment
15 on appellants' issue that the proceedings were improperly
16 bifurcated. Bifurcation of permit proceedings are not desirable
17 for coordinated planning of shoreline areas. In this case, the
18 substantial development permit and conditional use permit have
19 been consolidated for review purposes. The Board views the
20 identical nature of the proposed developments, the consolidation
21 of the permit appeals, and its role in the SMA process as
22 curative, or potentially so, of any procedural irregularities that
23 may have resulted. Any contention of irregularity is moot.

24 h. Section 3.13. Weyerhaeuser moved for summary judgment
25 on appellants' issue of the failure of DuPont or DOE to coordinate

1 with other agencies and jurisdictions with respect to the
2 conditional use permit as required by the SMA or SEPA. The
3 provisions of the SMA do not require consultation, coordination,
4 or notification of adjoining jurisdictions in addition to that set
5 forth in RCW 90.58.140. In contrast, the requirements of SEPA as
6 interpreted by SAVE v. Bothell, 89 Wn.2d 862 (1978), make clear
7 that there are genuine issues of material fact in dispute with
8 regard to the permit proceedings.

9 Weyerhaeuser's motion for summary judgment is granted on the
10 notice requirement of the SMA and is denied in all other respects.

11 1. Section 3.15. DOE and Weyerhaeuser moved for summary
12 judgment on appellants issue relating to the failure to comply
13 with SEPA and the SEPA guidelines by not preparing an
14 environmental checklist or threshold determination presents
15 material factual issues which are in dispute. The motion must be
16 denied.

17 2. Section 3.16. Weyerhaeuser's motion for summary
18 judgment on this issue must be denied because there are genuine
19 issues of material fact in dispute.

2
3 DONE this 11th day of December, 1981.

4 SHORELINES HEARINGS BOARD

5 See concurring and
6 dissenting opinion
7 NAT W. WASHINGTON, Chairman

8 
9 GAYLE ROTHROCK, Vice Chairman

10 
11 DAVID AKANA, Member

12
13 
14 A. M. O'MEARA, Member

15
16 
17 RODNEY M. KERSLAKE, Member
18
19
20
21
22
23
24
25

1 WASHINGTON, Member, concurring in part and dissenting in part:

2 I concur in the decision of the majority, except that I dissent
3 from that part of majority decision in item 3b Section 3.14, pages 3,
4 4, and 5, which grants respondent's motion for a partial summary judg-
5 ment. I dissent for the reason that I believe there are genuine
6 issues of material fact as to whether the project description and the
7 description of the use of the development were adequately set forth
8 in the public notice.

9
10
11 
12 NAT W. WASHINGTON, Chairman
13
14
15
16
17
18
19
20
21
22
23
24
25
26